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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 9643
)	
MARCUS WESLEY,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The court erred when it failed to conduct an appropriate *Krankel* inquiry into defendant's post-conviction claim of ineffective assistance of counsel; defendant's mittimus should be corrected to reflect the trial court's ruling; and the armed habitual criminal statute does not violate the second amendment or the state constitution.

¶ 2 Following a bench trial, defendant Marcus Wesley was convicted of being an armed habitual criminal under section 24-1.7(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/241.7(a) (West

2010)), aggravated unlawful use of a weapon (AUUW) under section 24-1.6(a)(1) of the Code (720 ILCS 5/24-1.6(a)(1) (West 2010)), and unlawful use of a weapon by a felon (UUWF) under section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2010)). At sentencing, the trial court expressly stated that all of the convictions would merge into the armed habitual criminal conviction. Defendant and his codefendant David Van, not a party to this appeal, were sentenced to the minimum term of six years' imprisonment. On appeal, defendant contends that: (1) the trial court failed to inquire into his posttrial claim of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984)); (2) his mittimus should be corrected to reflect the trial court's ruling, because multiple convictions would violate the oneact, one-crime rule; and (3) his conviction must be vacated because the armed habitual criminal statute violates the second amendment of the United States Constitution and Article 1, Section 22 of the Illinois Constitution. We affirm in part, vacate in part, and remand the cause for further proceedings.

¶ 3 The evidence at trial established that Chicago police officers Patrick Kelly, Joshua Zapata, and Jimmy Woods were on patrol during the early morning hours of April 30, 2010. Just after midnight, the officers received a radio call reporting a black male wearing a green shirt over a red shirt in possession of a gun in the areas of Lexington and Kenneth. Upon arriving, they saw a group of 5 or 10 people and observed defendant standing next to a man matching the description they received over the radio, who was later identified as codefendant Van. As the officers exited the vehicle, they observed Van drop a loaded gun, which he had removed from his waistband. Both defendant and Van began to run, and the officers pursued them. Officers Woods and Zapata testified that while chasing the men they observed defendant drop a gun onto the ground as he ran northbound on Kenneth. Officer Kelly recovered the gun, and defendant was eventually apprehended.

¶ 4 Defendant presented testimony from his niece, Marquesa Smith, and her boyfriend, Eric Ivy, that they were both with him and did not see him in possession of a gun. They also testified that there were at least 30 other people at Lexington and Kenneth on the night defendant was arrested, and a number of people, including Ivy, began to run when the officers exited their cars, and approached them.

¶ 5 At the police station, Officers Kelly and Zapata inventoried the guns retrieved from defendant and Van. Officer Andrew Camarillo testified that he spoke with defendant, and defendant told him that "ever since Little Tony got shot, the Meltons have been shooting at everybody, that's why we have our guns on us." Although defendant did not explicitly say he was carrying a gun, Camarillo understood this to mean that he was carrying a gun on the night he was arrested.

¶ 6 The State presented certified copies of defendant's conviction in 2006 for delivery of a controlled substance, his 2002 conviction for aggravated unlawful use of weapon, and his 1998 conviction for aggravated discharge of weapon. Defendant moved for a directed verdict, but the trial court denied the motion.

¶ 7 The trial court found defendant guilty on all charges. On February 17, 2012, defendant filed a *pro se* motion for a new trial with the court. In his motion, he raised an ineffective assistance of counsel argument. Specifically, defendant claimed that his attorney did not meet with him to "discuss any tactical decision" at any point and was ineffective for not presenting significant evidence that would have helped his case. Defendant also submitted to the trial court "some other documents," which are not part of the record on appeal.

¶ 8 On February 24, 2012, defendant's privately retained attorney also filed a posttrial motion on defendant's behalf. During the hearing on the motion, the trial judge indicated that she had received

defendant's materials, but was prohibited from viewing them because it would violate the rule against improper *ex parte* communications. The trial judge also heard defense counsel's argument on his motion for a new trial and denied it. The court reiterated that it had found defendant guilty of being an armed habitual criminal, UUW, and AUUW. At sentencing, the court expressly stated that the UUW and AUUW convictions were merged into the armed habitual criminal conviction, and sentenced defendant to the minimum term of six years in prison as an armed habitual criminal.

¶ 9 On appeal, defendant first contends that the trial court erred by failing to conduct an appropriate *Krankel* inquiry.

¶ 10 Where the trial court has made no determination on the merits of a defendant's *pro se* claim of ineffective assistance, our review is *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003); *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9.

¶ 11 Pursuant to *Krankel*, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct some type of preliminary inquiry into the factual basis to determine if they show possible neglect of the case warranting appointment of new counsel. *People v. Patrick*, 2011 IL 111666, ¶ 43. Our supreme court has held that "to raise an ineffective assistance of counsel claim, a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." *Moore*, 207 Ill. 2d at 79. A trial court may conduct a preliminary investigation by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; or (3) relying on its own knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. *Id.* at 78-79.

¶ 12 If, after a preliminary investigation into the allegations, the court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the motion. *Moore*, 207 Ill. 2d at 78. However, if the allegations show possible neglect of the case, the trial court should appoint new counsel to argue defendant's ineffective assistance claims. *Id.* "[T]he operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegations of ineffective assistance of counsel." *Id.* If the court fails to conduct the necessary preliminary examination as to the factual basis of the defendant's allegations, the case must be remanded for the limited purpose of allowing the court to do so. *Remsik-Miller*, 2012 IL App (2d) 100921, ¶¶ 17, 19. ¶ 13. As a preliminary matter, we address the State's reliance on *People v. Pecoraro*, 144 Ill. 2d 1 (1991) to argue that *Krankel* only applies to court-appointed counsel. In *Pecoraro*, the supreme court held that the trial court was not required to appoint new counsel pursuant to *Krankel* and alter the attorney-client relationship where the defendant had retained private counsel to represent him both at trial and at the hearings on his posttrial motions. *Id.* at 14-15. However, since *Pecoraro*, our supreme court has implicitly rejected the notion that *Krankel* only applies to appointed counsel. See *People v. Taylor*, 237 Ill. 2d 68, 78 (2010) (Burke, J., specially concurring) ("the majority assumes, without deciding, that *Krankel* applies to privately retained counsel since it addresses the merits of defendant's claim on a factual basis"). Moreover, we agree with the holding in *People v. Johnson*, 227 Ill. App. 3d 800, 810 (1992), where the court stated that it did not believe that *Pecoraro* stood "for the proposition that a trial court is free to automatically deny a *pro se* request for new counsel simply because the defense counsel who was allegedly ineffective was privately retained." Thus, we reject the State's contention that *Krankel* only applies to court-appointed counsel.

¶ 14 Next we note, in their briefs the State and defendant argue extensively about whether the trial court properly held that the "other documents" defendant submitted directly to the court in addition to his motion amounted to improper *ex parte* communication. However, we find that this is irrelevant to our analysis here. Regardless of whether the trial court properly rejected the "other documents" as *ex parte* it was required to act on defendant's *pro se* motion for a new trial because it was properly filed. *Moore*, 207 Ill. 2d at 77–78. Thus, the trial court erred by not addressing defendant's *pro se* motion.

¶ 15 Here, defendant's *pro se* motion, although inartfully drafted, clearly alleged an ineffective assistance of counsel claim. Specifically, defendant contended that his counsel "engaged in unethical and unprofessional practices" and erred in not consulting with him during his entire incarceration. Once alerted to defendant's claim, the court was required to inquire into the factual basis of his allegations by conducting an adequate preliminary investigation. *Moore*, 207 Ill. 2d at 78- 79. Accordingly, we find that the court was required to conduct a *Krankel* hearing in response to the allegations of ineffective assistance of counsel presented in defendant's *pro se* motion.

¶ 16 The State contends that even if defendant was improperly denied a *Krankel* hearing that it only amounted to harmless error. However, this argument, regardless of the ultimate merits of defendant's ineffective assistant claim, does not absolve the court of its duty to conduct a proper preliminary investigation into defendant's claim. *Moore*, 207 Ill. 2d at 79. In this case, it is clear from the record that the trial court failed to conduct an inquiry into defendant's ineffective assistance of counsel allegation. Although *Krankel* requires only a limited inquiry and can be satisfied in different ways, there must be "some type of inquiry into the underlying factual basis of defendant's *pro se* posttrial claim of ineffective assistance of counsel." *Id.* at 79. Defendant's claim may be

without merit or pertain to matters of trial strategy; however, the trial court must make that determination after an adequate inquiry. *Id.* at 78. Therefore, we remand for the limited purpose of allowing the trial court to conduct an adequate inquiry into defendant's claim. *Remsik-Miller*, 2012 IL App (2d) 100921, ¶¶ 17, 19.

¶ 17 Second, defendant contends, and the State agrees, that his mittimus must be corrected because it inaccurately reflects three convictions with concurrent sentences. The parties agree that the trial court merged the convictions and sentenced defendant on one count of being an armed habitual criminal. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we direct the clerk of the circuit court to amend the mittimus to reflect a single conviction for being an armed habitual criminal.

¶ 18 Finally, defendant contends that his conviction must be vacated because the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2010)) violates the second amendment of the United States Constitution and Article 1, Section 22 of the Illinois Constitution.

¶ 19 All statutes are presumed to be constitutional and the party challenging the statute bears the burden of proving the statute unconstitutional. *People v. Aguilar*, 2013 IL 112116, ¶ 15. Whenever reasonably possible, a court must construe a statute to uphold its constitutionality. *Id.* Whether a statute is constitutional is a question of law reviewed *de novo*. *Id.*

¶ 20 Defendant claims that his prior felony convictions do not change the fact that he has a federal and state constitutional right to possess a weapon for self-defense outside his home. He argues that the United States Supreme Court cases of *District of Columbia v. Heller*, 554 U.S. 570(2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), upholding the prohibitions on the possession of firearms by felons, should not be followed because the comments in these cases are *dicta* and were

rendered prior to the Seventh Circuit Court of Appeal's opinion in *Moore v. Madigan*, 702 F.3d 933(7th Cir. 2012) which found Illinois' aggravated UUW statute unconstitutional. We reject this argument.

¶ 21 It is well-settled that prohibitions on the possession of firearms by felons are a permissible restriction on the constitutional right to bear arms. *Heller*, 554 U.S. at 626. In *People v. Black*, 2012 IL App (1st) 110055, ¶ 13, this court found that the armed habitual criminal statute was constitutional as it reflects the legitimate governmental interest in preventing the danger associated with repeat felons having firearms. See also, *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011); *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011). The recent supreme court decision in *Aguilar* does not change our conclusion in *Black*. In *Aguilar*, our supreme court specifically stated that it was "in no way saying that [the second amendment right to bear arms] is unlimited or is not subject to meaningful regulation." *Aguilar*, 2013 IL 112116, ¶ 21. Unlike the comprehensive ban at issue in *Aguilar*, the armed habitual criminal statute is not a comprehensive ban, but rather it affects only a certain limited class of people, namely convicted felons. Because this court has recognized that convicted felons may be disqualified from the exercise of second amendment rights, we find that the armed habitual criminal statute is constitutionally sound.

¶ 22 For the above reasons, we remand this case for the limited purpose of conducting an inquiry into defendant's posttrial allegations of ineffective assistance, direct the clerk of the circuit court to amend the mittimus to reflect a single conviction for being an armed habitual criminal, and otherwise affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed in part; mittimus corrected; remanded with directions.